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Cases Cited.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 14.

IN THE MATTER OF THE PETITION FOR A WRIT OF HABEAS CORPUS FOR HARRY A. GROBAN AND NATHAN GROBAN.

APPELLANTS' BRIEF.

OFFICIAL REPORTS.

The Court of Common Pleas for Franklin county rendered its decision in this matter on April 21, 1954. The opinion is unreported but appears on page 3 of the record. The Court of Appeals of Franklin county rendered its opinion on October 8, 1954, and, although unreported, said opinion appears at page 6 of the record. The Supreme Court rendered its opinion on July 13, 1955, reported in 164 O. S. 26, 128 N. E. 2d 80, 57 O. O. 84, and appearing at page 10 of the record.

JURISDICTION.

The jurisdiction of this court is invoked by reason that the validity of a statute of the state of Ohio has been questioned on the grounds that it is repugnant to the Constitution of the United States, and the decision of the Supreme Court of Ohio favors the validity of the statute. Jurisdiction is pursuant to 28 U. S. C. 1257 (2) and within the time prescribed by 28 U. S. C. 2101 (c).

In the order of this court of April 23, 1956, it was requested that counsel brief the question of the jurisdiction of this court to consider any questions raised by the possible applicability of *In Re Murchison,* 349 U. S. 133, 99 L. ed 942, and *In Re Oliver,* 333 U. S. 257, 92 L. ed 682 to the proceedings in this case.

In the early case of *Buel v. Van Ness* (1823) 8 Wheat. 312, 5 L. ed. 624, it was determined that it was in the province of Congress to set forth to what extent that jurisdiction shall be vested in the Supreme Court. Congress has determined that jurisdiction, as set forth in 28 U. S. C. 1257, which in part is as follows:

> "Final judgment or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

The purpose of this section has been often and clearly stated. That is, to make certain that no judgment of a state court would be reviewed or appealed unless the highest court of the state had first been apprised that the

validity of the statute was being questioned as invalid on federal grounds. *Wilson v. Cook*, 327 U. S. 474, 90 L. ed. 793. The requirements imposed by Section 1257 are construed in the strict and technical sense. *Montgomery v. Ledbetter*, 344 U. S. 180, 79 L. ed. 204. *Radio Station v. Johnson*, 326 U. S. 120, 89 L. ed. 2092.

The only statute drawn in question as being invalid on the ground of its being repugnant to the Constitution was Ohio Revised Code Section 3737.13. (R. 11, 12) However, it is this writer's contention that in determining the repugnancy of this statute to the Constitution and thereby determining its validity, the statutes under favor of which the fire marshal conducted his investigation and the powers granted became pertinent.

The fire marshal conducted his investigation under favor of Section 3737.08, et seq., Ohio Revised Code. (Appendix A)

In the case of *In Re Oliver*, 333 U. S. 257, 92 L. ed. 682 the court had before it the Michigan statutes providing for the compelling of witnesses to appear and to testify before a one man grand jury. (Section 28.943 and 28.945) (Appendix B)

The sections similar to the Michigan statutes are:

Ohio Revised Code Section 3737.12:

> "The fire marshal or an assistant fire marshal may administer an oath to any person appearing as a witness before him. No witness shall refuse to be sworn or refuse to testify, or disobey an order of the marshal, or of an assistant marshal, or fail or refuse to produce a book, paper, or document concerning a matter under examination, or be guilty of contemptuous conduct after being summoned by such officer to appear before him to give testimony in relation to a matter or subject under investigation."

Ohio Revised Code Section 3737.99:

> "(A) Whoever violates section 3737.12 of the Revised Code may be summarily punished, by the officer concerned, by a fine of not more than one hundred dollars or commitment to the county jail until such person is willing to comply with the order of such officer."

Mr. Justice Black stated in the majority opinion of the case of *In Re Oliver*, 333 U. S. 257, 92 L. ed. 682 as follows:

> "The judge—grand jury immediately charged him with contempt, immediately convicted him, and immediately sentenced him to sixty days in jail. Under these circumstances of haste and secrecy, petitioner, of course, had no chance to enjoy the benefits of counsel, no chance to prepare his defense, and no opportunity either to cross examine the other grand jury witness or to summon witnesses to refute the charge against him."
>
> "We further hold that failure to afford the petitioner a reasonable opportunity to defend himself against the charge of false and evasive swearing was a denial of due process of law. A person's right to reasonable notice of a charge against him and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." (92 L. ed. 694)

In the instant case the fire marshal committed the appellants for refusing to be sworn and to testify. (R. 6) Had the appellants been sworn, found to be in contempt and summarily committed to prison by the fire marshal, and then had the appellants questioned the right to so commit, the doctrine of the cases of *In Re Murchison*, 349 U. S. 133, 99 L. ed. 942, and *In Re Oliver*, 333 U. S. 257, 92 L. ed. 682 would be directly in point and controlling.

Even though the facts of this case are not identical and the question as to fire marshal's right to summarily commit has not been raised, these cases and the doctrine set forth in the opinions are definitely significant in this case. It is not the contention of the petitioners that in all instances they are entitled to be represented by counsel. However, when the proceedings are of the nature where the officer, or tribunal before whom they are appearing, has the powers here conveyed to the fire marshal, then the additional power to declare the "hearing" to be private and to deny their request for counsel is a denial of procedural due process.

It is respectfully submitted to be within this court's jurisdiction to consider the applicability of these cases to the statutory power of the fire marshal, thereby disclosing the effect of a private "hearing" and of the denial by the fire marshal of the appellants' request for counsel. Revised Code 3737.13 does not stand alone, but is to be considered in conjunction with Sections 3737.12 and 3737.99, and the power given the fire marshal by such statutes. *In Re Murchison*, 349 U. S. 133, 99 L. ed. 942 and *In Re Oliver*, 333 U. S. 257, 92 L. ed. 682 disclose that the fire marshal's use of such powers would constitute a violation of due process. It is urged in this case that in view of such powers, the permitting of a "private hearing" is unconstitutional when "private" means the exclusion of counsel.

CONSTITUTIONAL AND LEGISLATIVE PROVISIONS APPLICABLE.

1. Amendment XIV of the Constitution of the United States:

> "Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state

wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

2. Section 3737.13 of the Ohio Revised Code:

"Investigation by or under the direction of the fire marshal may be private. The marshal may exclude from the place where such investigation is held all persons other than those required to be present, and witnesses may be kept separate from each other and not allowed to communicate with each other until they have been examined."

3. Ohio Revised Code sections pertaining to the investigation and powers of the fire marshal:

3737.08, 3737.09, 3737.10, 3737.11, 3737.12 and 3737.99 (Set out verbatim in Appendix A).

QUESTION.

Does the fire marshal's power to declare the hearing before him "private" and to deny appellants' request for counsel deny the appellants due process of law as guaranteed by the XIV Amendment to the United States Constitution?

STATEMENT OF THE CASE.

This matter comes before this Honorable Court as a result of a petition for a writ of habeas corpus being filed in the Common Pleas Court of Franklin county, Ohio, and the decisions of the courts of Ohio denying the writ. (R. 1, 3, 6, 13)

Harry A. Groban and Nathan Groban are the petitioners in the writ and are the appellants in this matter, and will be referred to in this brief as the appellants.

On January 22, 1954, a fire occurred on the premises of the Dresden Mills, Inc., Dresden, Ohio, which is owned, controlled and operated by the appellants. Shortly thereafter, the fire marshal for the state of Ohio started an investigation as to the cause of the fire and pursuant to this investigation subpoenaed the appellants together with all the records pertaining to the operation of their business. The appellants appeared in accordance with the subpoena, accompanied by their counsel. The state fire marshal refused to permit the appellants to have counsel present at the investigation and ordered that the appellants take oath and testify after excluding the presence of their counsel. The appellants refused to be sworn and testify for the reason that they were not permitted to be represented at the hearing by their attorney. Thereupon, the state fire marshal committed the appellants to the sheriff of Franklin county, Ohio, to be incarcerated until they were willing to testify. (R. 6)

ARGUMENT.

(A) Right of Assistance of Counsel.

Counsel on behalf of petitioners have been unable to find either a state or federal case directly in point with the issue in question.

The only provision of the Constitution directly providing for the right to the assistance of counsel is the Sixth Amendment. Not only does the Sixth Amendment apply solely to the federal government, but also the investigation of the fire marshal admittedly is not a "criminal prosecution" and the appellants are not "accused" within the language of said amendment. Clearly, the right to counsel is by no means absolute, but if such right exists, excluding the Sixth Amendment, such right must necessarily be derived from the "due process" clause of the XIV Amendment.

The term "due process of law" is a concept of justice which, being flexible, defies defining appropriately for all circumstances. "Due process" has been defined as merely an embodiment of the English sporting idea of fair play. *People v. Telkin,* 90 P. 2d 148, 34 Cal. App. 2d 743. It has been referred to as any legal proceeding enforced by public authority in furtherance of general public welfare preserving both liberty and the principle of justice. *Mac Veagh v. Multnomah County,* 270 P. 502, 126 Or. 417.

The clause means that the general rules which govern society or the law of the land protect the life, liberty and property of a citizen of the United States. *Cleveland R. R. Co. v. Backus,* 33 N. E. 421, 133 Ind. 513. The term is synonymous with "law of the land" protecting the citizen of the United States to equal and impartial justice in one state as well as another. *U. S. v. Yount,* 267 F. 861.

This Honorable Court in the case of *Wolf v. Colorado,* 338 U. S. 55, 93 L. ed. 1782, set forth the purpose and the construction to be given the clause which affords due process of law.

> "This clause exacts from the states for the lowliest and the most outcast all that is 'implicit in the concept of ordered liberty', * * *.
>
> "Due process of law thus conveys neither formal nor fixed nor narrow requirements. It is the compendious expression for all those rights which the courts must enforce because they are basic to our free society. But basic rights do not become petrified as of any one time, even though, as a matter of human experience, some may not too rhetorically be called eternal verities. It is *the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle,* due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights." (Emphasis supplied)

The federal Constitution was not intended to be a rigid document subject only to the strictest of interpretation. The concept of justice might remain the same but change in times might dictate an additional step to protect and insure the concept.

This Honorable Court's attention is respectfully referred to the *U. S. v. Pitt* case, 144 Fed. 2d 169, wherein the defendant was contesting the validity of certain sections of the Selective Service Act. Judge Biggs in delivering the opinion for the Third Circuit stated:

> "Section 625.1 (b) of the Regulations provides, however, that no person other than the registrant may appear before a local board. This is in effect a denial of the right to be represented by counsel before the Selective Service agencies. While a denial of the right to counsel in a judicial proceeding would constitute a denial of due process, the proceedings before

> the selective service agencies are not within that category. It will be observed moreover * * * *he at no time requested the Board to permit counsel to appear on his behalf. He does not assert that his lack of counsel is evidence of denial of due process.*" (Emphasis supplied)

Although the defendant did not request counsel in the case of *United States v. Pitt,* 144 Fed. 2d 169, nor did he claim the lack of counsel was evidence of a denial of due process, Circuit Judge Biggs thought the matter to be of such a nature as to state:

> "The proceedings before the local boards and the appeal boards are informal, stripped of any panoply of formal judicial tribunals. The local boards are composed of persons who are or should be familiar with conditions in the county in which they serve. Frequently they know the registrant and certainly they may not be deemed to be unaware of the problems which confront him. The registrant has the opportunity, if he seeks it, to sit down with the members of his local board and discuss fully with them his status or his claim for exemption. *We doubt if a better, fairer method could be devised to meet the requirement of raising armed forces in an emergency.* We are of the opinion, therefore, that the provisions of the Act afford adequate protection for the rights of the individual registrant, that they afford him due process of law, and that the Act is constitutional in all respects." (Emphasis supplied)

The proceeding referred to in the above quote was but for the purpose of classifying prospective service men. Judge Biggs did not attempt to decide the question on the basis of denial of due process since the proceedings were before the selective service agencies and not within that category.

However, if Judge Biggs thought the question was worth mentioning in a case where it wasn't raised and where he

doubted "if a better or fairer method could be devised", how would his opinion read with the issues of this case placed squarely before him?

Clearly the tenor of the inquiry before the local draft board is indeed in a different category than the investigation of a fire marshal and in particular the investigation sought to be conducted in the instant case.

Counsel upon research of this question found but two classes of cases where, in a preliminary proceeding, a party was denied the assistance of counsel. One was in a court martial proceeding, and the other in a proceeding before a grand jury.

The first "class" consisted of but one case; that is, *Romero v. Squier,* 133 F. 2d 528. In that case the Ninth Circuit Court of Appeals had before it the question of denial of counsel at a preliminary hearing prior to the appellant, Captain R. C. Romero, being court martialed. The pertinent facts appear in the following language at page 532 of the opinion:

> "* * * Appellant also claims that he was denied counsel at the investigation into the matters upon which the charge against him was later made, and hence that he was denied the right of counsel of the provision in the Sixth Amendment. The pertinent portion of that Amendment reads, 'In all criminal prosecutions, the accused shall enjoy the right * * * to have the Asistance of Counsel for his defense'. We do not regard the preliminary investigation as the 'criminal prosecution' for which the Sixth Amendment provides. Hence a failure to give the right of counsel to the party whose conduct is under preliminary investigation, is not a denial of a constitutional right so affecting the jurisdiction of the later convened court-martial, and hence is not subject to our consideration in a habeas corpus proceeding. * * *"

Writ of certiorari was denied by this court (318 U. S. 785, 87 L. ed. 1152). The court merely decided that the juris-

diction of a later convened court martial was not lost when at a preliminary investigation the defendant was denied counsel.

Pertaining to the preliminary investigation, the court failed to disclose:

(a) The nature, tenor, and significance or consequence of the investigation.

(b) Whether one or more persons conducted the investigation and whether the defendant was present by choice or compulsion.

Without the above facts there is absolutely no basis upon which to compare the proceedings in the above cited case to the matter before this Honorable Court and with these facts answered there would still be the question as to what procedural safeguards one is entitled in a civil court that he is not entitled before a military tribunal.

Even if the investigation was similar to the fire marshal's, this case would be of no value or significance in light of the case of *Reaves v. Ainsworth,* 219 U. S. 296, 55 L. ed. 225. In that case this court clearly and emphatically distinguished proceedings before the armed services from proceedings of this nature. The following language appears on pages 302-305 of the opinion of that case:

> "To those in the military or naval service of the United States, the military law is due process."

In the case of *Ex parte Benton,* 63 F. Supp. 808, the petitioner claimed a violation of the Sixth Amendment on the basis of ineffective assistance of counsel. The court stated at page 810 of its opinion:

> "But petitioner claims that the military court which tried and sentenced him lacked jurisdiction because he did not have the effective assistance of counsel for his defense as guaranteed by the Constitution (Amdt. VI) * * *"

> "This contention of petitioner is legally unsound because the constitutional guarantees of the 5th and 6th amendments relating to criminal prosecutions may not be invoked in 'cases arising in the land or naval forces' of the United States." (citing: Ex parte Quirin, 317 U. S. 1; Ex parte Milligan, 71 U. S. 2; U. S. v. Crystal, 131 F. 2d 576)

The case of *In Re Black,* 47 F. 2d 542, decided by the Second Circuit stands as having denied a witness the right to counsel. Judge Augustus Hand in the opinion whereby a motion to vacate was denied and the petitioner was ordered to appear before a New York grand jury, stated at page 543:

> "Neither at a trial nor before a grand jury is he entitled to have the aid of counsel when testifying."

Later *In Re Black,* 47 F. 2d 542 was cited and followed by the District Court of Missouri in the case of *U. S. v. Blanton,* 77 F. Supp. 812. This case was one where defendant complained that he "was not advised of his right of counsel" when he was called before the grand jury.

In these cases the investigation was before a grand jury. There was no indication that the hearing was in any nature comparable with the situation presently before this court.

The distinguishing and alarming fact is that in the instant case there is an individual with the sole, unrestrained and unlimited power to:

(1) Call before him any persons "supposed to be cognizant of any facts or to have means of knowledge in relation to the matter concerning which an examination is required to be made." (R. C. 3737.09)

(2) Summon and compel the attendance of such witnesses to testify to any matter which is proper subject of inquiry. (R. C. 3737.11)

(3) Arrest and charge a witness against whom, in his opinion, there is sufficient evidence to charge with the crime of arson.

(4) Summarily punish by fine or commitment to the county jail any wtiness who refuses to be sworn or to testify. (R. C. 3737.12 and 3737.99)

This individual, the fire marshal, has the sole power to determine the nature and extent of the questions, the time, place and duration of the examination, what documents are to be produced, what constitutes disobedience of an order, what constitutes failure to produce documents, and what constitutes contemptuous conduct. Couple all this power with the power to arrest and charge a person of the crime of arson if in *his opinion* there is sufficient evidence, and the magnitude of the investigatory powers of the fire marshal become apparent and indeed appalling.

(B) Private Hearing.

Revised Code 3737.13 permits the fire marshal to exclude everyone other than those required to be present. As interpreted by the Ohio Supreme Court, this means only the "accused" or the witness and the marshal himself, the only requirement being that the testimony be "reduced to writing". (R. C. 3737.09) The marshal may or may not have the testimony transcribed verbatim, it being only necessary that he or someone "reduce" the testimony to writing.

Section 3737.13 must be read in conjunction with the other pertinent sections of this chapter; that is, Sections 3737.08, 3737.09, 3737.10, 3737.11, 3737.12, and 3737.99 to determine not only the nature of the proceedings but the effect of permitting the fire marshal to conduct such an investigation which is not a hearing when declared to be "private".

This Honorable Court's findings in the cases of *In Re Murchison,* 349 U. S. 133, 99 L. ed. 942, and *In Re Oliver,* 333 U. S. 257, 92 L. ed. 682 readily point out the unconstitutionality of such statutes which permit one to summarily commit a citizen in a manner set forth in Chapter 37 of the Ohio Revised Code. It is not the contention of the petitioners that a hearing cannot be declared secret or private and thereby exclude members of the public. However, when the power granted to the fire marshal is such that the witness can be summarily punished and confined for the numerous items designated in R. C. 3737.12, how can the "hearing" be private without denying him the rights guaranteed under the due process clause of the Constitution?

The following language appears in the opinion delivered by Mr. Justice Black in the case of *In Re Oliver,* 333 U. S. 257, 92 L. ed. 682:

> "Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution."
>
> "* * * no court in this country has ever before held, so far as we can find, that an accused can be tried, convicted, and sent to jail, when everybody else is denied entrance to the court, except the judge and his attaches."

The above quotes had specific application to a petitioner who had become accused and summarilly confined for contempt under authority identical to the authority granted the Ohio fire marshal. In the instant case, the petitioners were not sworn nor did they testify, but they were summarily confined. The petitioners' objection to being sworn and to testify was solely on the basis that the hearing had been declared "private", to the extent that even their

counsel was not permitted to be present. If Section 3737.13 is to be constitutional in the light of Section 3737.12 and Section 3737.99, definite provisions protecting the witnesses must clearly be inserted.

Had the petitioner in the case of *In Re Oliver*, 333 U. S. 257, 92 L. ed. 682 questioned the statute granting the judge-grand jury the right to secretly question him in chambers rather than the statute of commitment, would this court's answer have been different?

It would appear to make no difference whether one were to attack the statute permitting commitment or the statute permitting the investigator to secretly question the witness having at his disposal the power to summarily commit.

The state of Ohio is required to comply with the supreme law of the land, providing the citizens of its state the justice and fairness in proceedings that such citizens could expect and would be entitled to in any other state, and it is strongly urged that R. C. Section 3737.13 is repugnant to the concepts of procedural due process. This writer is not contending that the cure-all to the proceedings of the fire marshal is to designate that such proceedings must be public. However, it appears fundamental that the minimum would be that said witness would be entitled to assistance by counsel.

Respectfully submitted,

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ERNEST B. GRAHAM and
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APPENDIX A.

Ohio Revised Code Section 3737.08.

The fire marshal, the chief of the fire department of each municipal corporation in which a fire department is established, the mayor of each village in which no fire department exists, and the township clerk of each township without the limits of a municipal corporation, shall investigate the cause, origin, and circumstances of each fire occurring in such municipal corporation or township by which property has been destroyed or damaged, and shall make an investigation to determine whether the fire was the result of carelessness or design. The investigation shall be commenced within two days, not including Sunday, if the fire occurred on that day. The marshal may superintend the investigation.

An officer making an investigation of a fire occurring in a municipal corporation or township shall forthwith notify the marshal, and within one week of the occurrence of the fire shall furnish him with a written statement of all facts relating to its cause and origin and such other information as is required by forms provided by the marshal.

In the performance of the duties imposed by sections 5737.01 to 3737.28, inclusive, of the Revised Code, the marshal and each of his subordinates, at any time of day or night, may enter upon and examine any building, or premises where a fire has occurred, and other buildings and premises adjoining or near thereto.

Ohio Revised Code Section 3737.09.

If in the opinion of the fire marshal further investigation is necessary, he, or an assistant fire marshal, shall take or cause to be taken testimony on oath of all persons

supposed to be cognizant of any facts, or to have means of knowledge in relation to the matter concerning which an examination is required to be made, and cause such testimony to be reduced to writing.

Ohio Revised Code Section 3737.10.

If the fire marshal or an assistant fire marshal, is of the opinion that there is evidence sufficient to charge a person with arson or a similar crime, he shall arrest such person or cause him to be arrested and charged with such offense. Such marshal or assistant shall furnish the prosecuting attorney such evidence, with the names of witnesses, and a copy of material testimony taken in the case.

Ohio Revised Code Section 3737.11.

The fire marshal or an assistant fire marshal may summon and compel the attendance of witnesses to testify in relation to any matter which is a proper subject of inquiry and investigation, and may require the production of any book, paper, or document.

Ohio Revised Code Section 3737.12.

The fire marshal or an assistant fire marshal may administer an oath to any person appearing as a witness before him. No witness shall refuse to be sworn or refuse to testify, or disobey an order of the marshal, or of an assistant marshal, or fail or refuse to produce a book, paper, or document concerning a matter under examination, or be guilty of contemptuous conduct after being summoned by such officer to appear before him to give testimony in relation to a matter or subject under investigation.

Ohio Revised Code Section 3737.13.

Investigation by or under the direction of the fire marshal may be private. The marshal may exclude from the place where such investigation is held all persons other

than those required to be present, and witnesses may be kept separate from each other and not allowed to communicate with each other until they have been examined.

Ohio Revised Code Section 3737.99.

(A) Whoever violates section 3737.12 of the Revised Code may be summarily punished, by the officer concerned, by a fine of not more than one hundred dollars or commitment to the county jail until such person is willing to comply with the order of such officer.

APPENDIX B.

Michigan Statute—Section 28.943.

Whenever by reason of the filing of any complaint, which may be upon information and belief, any justice of the peace, police judge or judge of a court of record shall have probable cause to suspect that any crime, offense, misdemeanor or violation of any city ordinance shall have been committed within his jurisdiction, and that any person may be able to give material evidence respecting such offense, such justice or judge in his discretion may, and upon the application of the prosecuting attorney, or city attorney in the case of suspected violation of ordinances, shall require such person to attend before him as a witness and answer such questions as such justice or judge may require concerning any violation of law about which he may be questioned; and the proceedings to summon such witness and to compel him to testify shall, as far as possible, be the same as proceedings to summon witnesses and compel their attendance and testimony, and such witnesses shall be entitled to the same compensation as in other criminal proceedings.

Michigan Statute—Section 28.945.

Any witness neglecting or refusing to appear in response to such summons or to answer any questions which such justice or judge may require material to such inquiry, shall be deemed guilty of a contempt and shall be punished by a fine not exceeding one hundred (100) dollars or imprisonment in the county jail not exceeding sixty (60) days or both at the discretion of the court: *Provided*, That if such witness after being so sentenced shall appear and answer such question, the justice or judge may in his discretion commute or suspend the further execution of such sentence.